Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-617

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Petitioners,

vs.

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray that a cross writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered June 21, 1974, as amended July 29, 1974.

OPINIONS BELOW

The findings of fact, conclusions of law, order for judgment and the judgment of the United States District Court for the District of North Dakota, Southwestern Division, are unreported and are printed in Appendix A of the petition for writ of certiorari filed by Provident Life Insurance Company, R. W. Edick, et al., as trustees of the Provident Life Insurance Company voting trust in case number 74-423. Since this is a cross petition for writ of certiorari and will probably be considered simultaneously with the petition in case number 74-423 the same are not reprinted in connection with this petition but references will be made to Appendix A pp. A1-A18 of the petition in case number 74-423. The opinion of the Court of Appeals for the Eighth Circuit is reported in 499 F.2d 715 and since it is printed in Appendix B to the petition in said case number 74-423, pp. A19-A38, the same is not again printed in connection with this cross petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1974 and amended July 29, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). Petition for rehearing and for rehearing en banc were denied by order entered on July 29, 1974. By order of this Court entered on November 2, 1974, the time for filing of this cross petition for writ of certiorari was extended to November 20, 1974.

QUESTIONS PRESENTED

I

Whether the extension of the Provident Life Insurance Company voting trust agreement was invalid under NDCC

10-19-35, the North Dakota statute regulating voting trust agreements and a judgment so declaring should be entered by the Court.

II

Whether registration of the proposed extension of the Provident Life Insurance Company voting trust agreement under the provisions of the Securities Act of 1933 was a condition precedent to valid solicitation of consents to the extension.

III

Whether the failure to register the original voting trust certificates in 1955 under the provisions of NDCC 10-04-02, the North Dakota statute requiring registration of securities and similar statutes in other States invalidated the subsequent solicitation of consents to the extension of the voting trust certificates.

IV

Whether the District Court should have allowed the plaintiffs to offer proof that all expenses in connection with the extension of the voting trust, including the expenses of solicitation of the consents were paid for by Provident Life Insurance Company and if so, did such payments constitute remuneration, direct or indirect for solicitation of an exchange, actually being solicited by the voting trustees, within the meaning of Section 3 (a) (9) of the Securities Act of 1933 and related State laws.

V

Whether, since the trustees of the voting trust failed to register the Provident Life voting trust agreement under the provisions of the Securities Exchange Act of 1934 as amended and no compliance was made with the proxy regulations under the Act, the Court should have held that since proper solici-

tation was not made before the expiration of the voting trust agreement on November 15, 1970, all consents to the extension of the voting trust agreement were void, instead of permitting resolicitation, if the voting trustees are so advised, under the direction of the District Court.

VI

Whether the petitioners as stockholders of Provident Life Insurance Company and voting trust certificate holders have standing to maintain this declaratory judgment action under the provisions of the Securities Act of 1933 and corresponding securities laws of the various States.

STATUTES INVOLVED

North Dakota Century Code (NDCC) Sections 10-04-02, 10-04-04, 10-04-17, and 10-19-35, App A1 and A2.

Section 2 (1) (2) (3) (4) of the Securities Act of 1933, 48 Stat. 74, 15 U.S.C. Section 77 (b) (1) (2) (3) (4) set forth in Appendix A, Page A2.

Section 3 (a) (9) of the Securities Act of 1933, 48 Stat. 75, 15 U.S.C. Section 77 (c) (a) (9) set forth in Appendix C page A39 of the petition in case number 74-423.

Section 5 of the Securities Act of 1933, 48 Stat. 77, 15 U.S.C. Section 77 (3) set forth in Appendix A, infra, page A2.

Section 12 of the Securities Act of 1933, 15 U.S.C. Section 77 (1), 48 Stat. 84 and Section 16 of the Securities Act of 1933, 48 Stat. 84, 15 U.S.C. Section 77p, both set forth in Appendix A, infra, page A3, A4.

Section 12 (g) (1) and 12 (g) (2) (G) of the Securities Exchange Act of 1934, 78 Stat. 565, 567, 568, 15 U.S.C.

Section 78 (1) (g) (1) and 78 (1) (g) (2) (G) set forth in Appendix C pages A39 and A40 of the petition in case number 74-423.

Section 14 (a) (78 Stat. 569) and 14 (d) (1) (82 Stat. 455 and 84 Stat. 497), of the Securities Exchange Act of 1934, 15 U.S.C. Section 78 (n) (a) and 88 (n) (d) (1) set forth in Appendix C pp. A41, A42 of the petition in case number 74-423.

Section 29 of the Securities and Exchange Act, 48 Stat. 903, 15 U.S.C. 78cc set forth in Appendix A, infra, page A4.

STATEMENT

In the portion of this petition entitled "Opinions Below" this petition is stated to be a petition for a cross writ of certiorari. The petitioners herein have filed a brief opposing the petition for writ of certiorari filed by the respondents herein in case number 74-423. Since the petitioner herein is opposing the grant of the petition for writ of certiorari upon the grounds stated in said brief, the said petitioners herein do not desire that a writ of certiorari be granted on this cross writ unless the Court should determine that the petition will be granted in case number 74-423. If the petition is denied in said case number 74-423, the petitioner herein will be satisfied to have this petition denied. Should the petition in case number 74-423 be granted, then it is submitted that the decision of the Circuit Court of Appeals of the District Court on the matters hereinafter set forth justify the granting of a cross writ.

The statement set forth in the petition in case number 74-423, commencing on page 4, as added to by the supplement to statement of petitioner as to the facts and history of the action commencing on page 2 of the respondents' brief in case number 74-423, is adopted as a part of the statement in support of this petition supplemented by the following additional statement required to cover the questions raised in this petition.

As shown by the petition in case number 74-423 the petitioners in said case have filed as the record in this Court a two volume printed appendix filed and used as the record in the Court of Appeals and said record and a copy of the docket entries is now on file in this Court in connection with case number 74-423 and as this is a cross petition references are hereby made to said two volume printed appendix designated R and RII and the docket entries.

While registration was made of the voting trust agreement dated November 15, 1955 and the voting trust certificates issued thereunder, with the Securities and Exchange Commission pursuant to the requirements of Section 6 of the Securities Act of 1933, Title 15 U.S.C. 77 (f) after their failure to do so in November, 1955 was called to the attention of the trustees of the voting trust, no registration was ever made with the Securities Commissioner or other applicable officer in any State and particularly no such registration was made in North Dakota (RI pages 54, 63 and 68).

The original voting trust agreement dated November 15, 1955 was made at a time when there was no statutory provision in North Dakota relating to voting trusts affecting shares in corporations. The agreement was to run for a term of 15 years and was to expire on November 15, 1970. Paragraph 13 of the trust agreement (RII, 4) provided as follows:

> "The trustees and any or all of the stockholders becoming parties hereto may, by mutual consent, and from time to time, agree to extend this trust and the terms of this agreement. Any individual stockholder not caring to join in the extension of said trust and the terms of this agreement may, on the expiration date, surrender his or her voting trust certificate or certificates and receive a certificate of stock of Provident Life Insurance Company for the number of shares which she or he is entitled."

Paragraph 19 of the same agreement provided as follows:

> "Duplicate originals. This agreement may be executed in

> several counterparts, each of which so executed shall be deemed to be an original and such counterparts shall together constitute but one and the same instrument."

Effective July 1, 1957, by Chapter 102 of the Session Laws for the year 1957 North Dakota adopted the then existing version of the Model Business Corporation Act being proposed by the cooperative efforts of the Committee on Corporate Laws, Section of Corporation, Banking and Business Laws of the American Bar Association and the American Bar Foundation. Note the unusual finding of fact number 21 prepared by counsel for the respondents and adopted by the District Court in making its findings (finding number 21, Appendix A page A8 of the petition in 74-423) in which the Court purported to find how the section of the Model Act dealing with voting trusts became the law and then later was codified as NDCC Section 10-19-35, set forth in the Appendix hereto A2. The statement is believed to be incorrect and reference to the first edition of Model Business Corporation Act, Annotated, published by the American Bar Foundation shows that Section 32 as finally proposed by the American Bar Foundation in 1960 was exactly the same as Section 31 of Chapter 102 of the North Dakota Session Laws for 1957 now NDCC 10-19-35, referred to above. Reference to the second edition of the Model Business Corporation Act, Annotated, published by the American Bar Foundation shows that the original Section 32 was changed to be Section 34 (see page 732 of the second edition of the Model Business Corporation Act, Annotated, Volume 1, where the statement is made:

> "In 1969 Section 34 was amended to require the trustees under a voting trust to maintain a record of holders of voting trust certificates comparable to that required to be kept by a corporation for its shareholders and to make such record subject to inspection and like fashion. This requirement codifies what has come to be regarded as good practice."

After the passage of the North Dakota Business Corporation

Act, and particularly NDCC 10-19-35, there was no provision in effect for extending a voting trust agreement.

All consents to the extension were signed and the extension agreement was in fact made by the voting trustees before the expiration of the original voting trust agreement and therefore provided for a term extending for more than 10 years. See the certificate issued to Midland National Life Insurance Company in February, 1970, which provided for a termination date of November 14, 1980 (RII, page 46). Except where there were transfers before November 14, 1970, in which event new certificates were issued like the one issued to Midland, all certificates were stamped with a rubber stamp legend:

> "Voting trust agreement has been amended and the termination date extended to November 14, 1980 by consent of the registered holder thereof." (See RII, page 45)

Although Section 10-19-35 required the filing or depositing with the corporation of a counterpart of the voting trust agreement, only copies, as distinguished from a counterpart, were filed and the copies were not complete copies because of the omission of the name and address that was on the left-hand side of each consent form at the time of execution by the voting trust certificate holder. (Brief of respondents in opposition to petition in case number 74-423 page 5.)

Although the North Dakota law regulating voting trusts, effective July 1, 1957, made no provision for extensions the amended agreement (RII, 28, paragraph 11, page 30) again provided.

> "The trustees and any and all of the stockholders becoming parties hereto may, by mutual consent, and from time to time agree to extend said trust and the terms of this agreement."

1,343 consents to the amendment of the voting trust agreement were obtained but none of the shares of Provident Life Insurance Company stock held by the voting trustees were

returned to the voting trust certificate holders so that the shares could be retransferred to the trustees for the purpose of the voting trust agreement as contemplated by Section 10-19-35, supra.

As to the question as to whether the voting trustees were entitled to a Section 3 (a) (9) of the Securities Act of 1933 exemption because an exchange of new securities between an existing issuer and the existing security holders was involved, on the ground that there was no commission or other remuneration paid, directly or indirectly, and the right to go into what had been paid by Provident Life Insurance Company for the benefit of the voting trustees had been denied by the District Court, an offer of proof was made. At page 83 of RI of the record filed in 74-423, R. W. Edick, President of Provident Life and one of the voting trustees, was on the witness stand under cross-examination by counsel for the petitioner and an effort was being made which was rejected by the District Court, to show that remuneration was paid directly or indirectly which destroyed the Section 3 (a) (9) exemption. After the objection was sustained, the following offer of proof was made and rejected, to-wit:

> "Now, may it please the Court, so as to shorten this up then, I now make an offer of proof to show by this witness that in connection with the arrangements for the solicitation for this extension agreement beginning sometime in the early part of 1969 and down to and including November 12, 1970, when the copies, as distinguished from the counterparts, were filed with Provident Life Insurance Company, that Provident Life Insurance Company, of which the Trustees were all members of the board of directors, paid the law firm represented by Mr. Sugrue, of which Mr. Sugrue is a partner, paid all of their expenses in connection with advising on preparing the prospectus preparing the consent form, and advising as to whether registration was necessary in the various states or not. That that was all paid by Provident Life Insurance Company.

> That Provident Life Insurance Company paid the printing bill for the prospectus, the consent forms, paid the postage bill on all solicitation letters, including the repeat solicitation letters. That it prepared and caused and had prepared and filed with the Commissioner of Insurance of the State of North Dakota forms of conversations or of the language to be used by persons using the telephone to solicit the various certificate holders to sign the consents. That it paid all of those telephone bills. That it caused its agents to go and make contacts with the Voting Trust Certificate holders located in the various states and located in North Dakota to sign consents and send them in.
>
> And that offer is made on the theory that that constitutes into these circumstances where the company and the board – members of the board of directors were also the Voting Trustees were tied together. That there was compensation paid indirectly so that the exemption under Section 3 (a) (9) of the federal statute and the similar exemption in the various states that have similar exemptions do not apply because there was compensation paid direct or indirect."

The Securities and Exchange Commission in its amicus curiae brief in the Circuit Court of Appeals took the position that when the voting trust agreement expired on November 15, 1970 and there was a solicitation of extension thereof that a new trust was involved so that there was not a proposed exchange of securities between an existing issuer and existing security holders so that there was no Section 3 (a) (9) exemption available. The Commission's brief stated:

> "The terms of the original trust agreement seem unambiguous that the trust would and did expire on November 15, 1970. While the original trust agreement contemplated the possibility that some or all of the participants might join in a voting trust arrangement beyond the original term, no certificate-holder could have been compelled under its provisions to participate in any renewal (RI-106, RII-4). In these circumstances, the investment decision that each offeree was asked to make in 1969 and 1970 was substantially identical to the decision investors had

been asked to make in 1955 when the original voting trust was created. Just as in 1955, the solicitors were seeking by consent of sufficient Provident Life security-holders to retain control of the company through the trust; investors were equally free to accept or refuse the offer of participation and were equally in need of access to all relevant material information in order to make their investment judgment. For these reasons, we view those to whom the offer of an 'extension' was made as being no less in need of the Securities Act's protection than were those who were solicited to participate in 1955. Of course, in 1955, those who sought the right to manage the affairs of Provident Life through the voting trust complied with the registration requirements of the Securities Act (RI 35).

In view of the 'need of the offerees for the protections afforded by registration,' Ralston Purina, supra, we believe this Court should conclude that, as a matter of federal law, the new and the old trusts must be considered separate legal entities for purposes of Securities Act registration, regardless of whether they might for some purposes under state law be treated as a single continuing entity. When the new voting trust is viewed as the issuer of entirely new certificates, it is apparent that it had no 'existing security holders' with which to exchange securities when it was formed. Accordingly, the exemption from the registration requirements of the Securities Act of 1933 provided by Section 3 (a) (9) was not available, and the offer and sale of interests in the new voting trust without registration violated Section 5 of that Act, 15 U.S.C. 77e."

REASONS FOR GRANTING THE WRIT

(1) The question whether the extension of the Provident Life Insurance Company voting trust agreement was valid under North Dakota law so that the extended voting trust certificates were void and should not be allowed to circulate in the securities markets, raises important questions of law as to interpretation of a provision of the Model Business Corporation Act. The

Court of Appeals, although this was a model law, gave almost no consideration, in the absence of directly applicable North Dakota decisions, to the case law of other States and said in its opinion (App. A page 27 of the petition in 74-423):

> "We defer to the trial court's experience in interpreting North Dakota law and its construction of the statute here in question."

The petitioners were entitled to have the view of the Court of Appeals on North Dakota law and particularly where a provision of a model law was involved. See Justice Frankfurter's statement in his concurring opinion in Bernhardt vs. Polygraphic Co., 350 U.S. 198, 100 L.Ed. 199, 76 S.Ct. 273 where he said:

> "But the defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot, under the Act of Congress be foreclosed by the District Court's interpretation."

This Court should re-examine the important question as to the obligation of Courts of Appeal to consider decisions in other Courts in determining what the law is of a particular State, particularly where a model or uniform law is involved.

(2) The question as to whether the solicitation of an extension of a voting trust involves in effect a new voting trust agreement and not just an exchange of securities between an existing issuer and its security holders, raises an important question involving interpretation of Section 3 (a) (9) of the Securities Act. The decision of the Court of Appeals is contrary to the position of the Commission. The question is an important public issue and should be disposed of by this Court.

(3) The District Court and the Court of Appeals both failed to give any consideration to the effect of the failure of the trustees of the Provident Life Insurance Company voting trust to register the original voting trust certificates in 1955 under the provisions of NDCC 10-04-02 and similar statutes in

other States and determining whether a Section 3 (a) (9) type exemption is available. This is an important public question of considerable importance to the entire securities industry and should be disposed of by this Court.

(4) What constitutes the payment of remuneration direct or indirect for soliciting an exchange of securities so as to destroy the Section 3 (a) (9) exemption, if it was available, is likewise is an important question of securities law. The offer of proof proposed to establish that instead of the voting trustees paying the expenses in connection with the extension of the voting trust, including legal printing and the actual expenses of solicitation that the same was all paid by Provident Life Insurance Company. Even if the payment of such expenses by the voting trustees might have been considered only incidental expenses, when the same was paid by a third party and the obligation was the obligation of the trustees, then it is submitted that this constitutes the payment of remuneration direct or indirect and this question ought to be decided by this Court.

(5) Both Reserve Life Insurance Company and Midland National Life Insurance Company had acquired common stock of Provident Life Insurance Company and voting trust certificates on which the term purported to be extended as to their expiration date to November 14, 1980. Both companies desire to make further purchases of stock of the company and they are entitled to know whether voting trust certificates can be canceled and stock demanded because of the invalidity of the voting trust agreement. The standing of the petitioners to seek a declaratory judgment as to violations of the Securities Act of 1933 was denied by both the District Court and the Court of Appeals.

(6) There appears to be a diversity of decisions as to who is a purchaser entitled to assert remedies under the Securities Act of 1933 and particularly as to whether a private person can maintain a declaratory judgment action such as was brought

in this case and was similar in nature to the action for rescission as was involved in the leading case on voting trusts of Corporation Trust Co. vs. Logan, 52 F.Supp. 999. In that case the Court held that remedies other than money judgment were permissable and that the owner of a voting trust certificate could raise the question as to the validity of the voting trust certificates in the face of the failure to register under the 1933 Act. The Court in the Logan case cited Deckert vs. Independence Corp., 311 U.S. 282, 61 S.Ct. 229, 233, 84 L.Ed. 189 where that Court said:

> "We think the Securities Act does not restrict purchasers seeking relief under its provision to a money judgment. On the contrary, the Act as a whole indicates an intention to establish a statutory right which the litigant may enforce in designated Courts by such legal or equitable actions or proceedings as would normally be available to him."

Also in footnote 17, the Court in the Logan case cited Section 16 of the Act, 15 U.S.C. Section 77p, which provides:

> "The rights and remedies provided for by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

The Court of Appeals in our case recognized the existence of an important problem as to the rights of private litigants under the 1933 Act and pointed out differences in decisions in Corporation Trust Co. vs. Logan, supra, including Kinsey vs. Knapp, 154 F.Supp. 263, same case on appeal, 249 F.2d 797, cert denied 356 U.S. 936, 78 S.Ct. 778, 2 L.Ed. 2d 812. This Court should take jurisdiction so as to settle the apparent differences in the various Courts on this subject.

ARGUMENT

I

Whether the extension of the Provident Life Insurance Company voting trust agreement was invalid under NDCC

10-19-35, the North Dakota statute regulating voting trust agreements and a judgment so declaring should be entered by the Court.

In this case the District Court did not render an opinion of any kind as to either the facts of the law. Both sides submitted proposed findings of fact and conclusions of law and the set submitted by the respondents were adopted without change. While we recognize the rule is that even though the findings of fact and conclusions of law are prepared by counsel that they are nevertheless the findings and decisions of the Court when adopted, O'Leary vs. Liggett Drug Co. (C.C.A. Ohio 1945) 150 F.2d 656, note has been taken by various Courts that findings and conclusions which represent a trial judge's "independent judicial labors and study" are far more helpful than the mechanical adoption of the successful attorney's "suggested findings". See Kinnear-Weed Corp. vs. Humble Oil & Refining Co., 259 F.2d 398, 400, and United States vs. Forness, 125 F.2d 928, 942. At this point we again refer to the language in Justice Frankfurter's concurring Opinion in Burnhardt vs. Polygraphic Co., cited supra in the statement of Reasons for Granting the Writ portion of this petition where Justice Frankfurter said:

> "But the defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot, under the Act of Congress, be foreclosed by the District Court's interpretation."

See also Luke vs. American Family Mutual Insurance Company, 476 F.2d 1015 where the Court of Appeals for the Eighth Circuit said:

> "You give great weight to the view of the State law taken by the District Judge experienced in the law of that State, although, of course, the parties are entitled to review by us of the Trial Court's determination of State law just as they are of any other legal question in a case."

In Hoellinger vs. Molzohon, 41 N.W. 2d 217, 77 N.D. 108, 19 ALR 2d 1147, the Court said:

> "In determining such intent (legislative intent in adopting a statute) the meaning of the words used and the language of the statute as a whole must be considered. Other aids in construction of the subject matter are the purpose of the statute, the reason for its enactment, the evils at which the legislation is aimed, the historical background, the construction of similar statutes by other Courts and consideration of other statutes on related subjects."

It is the position of the petitioners that the Court of Appeals did not give adequate consideration to the decisions of other Courts relating to statutes regulating voting trusts particularly since this statute was part of a Model Law.

In the absence of statutes the length of time that the power to vote corporate stock could be suspended was a matter on which the Courts differed and to provide regulation in this field statutes similar to NDCC 10-19-35 (see App. A page 2) were adopted.

The leading case on the subject of the effect of statutes being passed by the legislature regulating voting trusts or changing the terms of the statutory law relating to voting trusts is the case of in re Morse, 247 N.Y. 290, 160 N.E. 374. It appeared that the statute on voting trusts did not make an exception as to stockholders of banks. The trust agreement relating to stock of a bank was entered into on December 31, 1924. On March 12, 1925 a new public policy was declared by the legislature in providing that the section on voting trusts shall not apply to a banking corporation. The question presented was to the effect of this amendment as to an existing valid voting trust agreement involving bank stock.

The Court said:

> "Whatever the rule of the common law may have been, when the legislature, the source of corporate power and authority acts, voting trusts become legal when organized in conformity with the statute and not otherwise. * * * Public policy, although an aid to the interpretation of ambiguous statutes, is powerless to create an exception

when their language is plain and all comprehensive."

The Court further said:

> "In New York voting trusts do not stand or fall on common-law theories of public policy. They are recognized and regulated by statute. Whether they would be valid at common law in the absence of a statute defining and regulating them is immaterial. Public policy in regard thereto is defined by the legislature. Between the conflicting rules of the common law, a choice has been made. No voting trust not within the terms of the statute is legal, and any such trust, so long as its purpose is legitimate, coming within its terms, is legal. The test of validity is the rule of the statute. When the field was entered by the legislature, it was fully occupied and no place was lefto for other voting trusts. * * * Constitutional questions seem simple. The separation of the voting power from the beneficial ownership of stock of banking corporations is a matter for regulation by the police power of the State. Banking is a business affected with the public interest."

This holding is not different from the North Dakota decisions. In in re White, 69 N.D. 61, 284, N.W. 357, the Court quoted with approval from Commonwealth vs. Commissioner of Banks, 240 Mass. 244, 133 N.E. 625, 628, as follows:

> "It is the general principle that, when legislation covers the entire field, previous provisions of either the common or statutory law in conflict therewith become no longer operative."

Also cited was Fry vs. Equitable Trust Company, 264 Mich. 165, 249 N.W. 619, 90 ALR 175.

The Court then discussed statutes of North Dakota as to there being no common law in any case where the law is declared by the codes and then said:

> "It follows from these sections that if a particular statute is so designed that it covers the entire field to which it relates, it does so to the exclusion of the common law."

See also to the same effect as the Morse decision Gertenbach

vs. Rodnon et al, 171 Misc. 302, 12 N.Y.S. 2d 518 and Mannheimer vs. Keehn, 41 N.Y.S. 2d 542, also citing the Morse case. In that case it appeared that there was a previous voting trust which was entered into on March 1, 1926 and expired at the end of February, 1936, which was the date when the term of the new agreement was to commence. The solicitation occurred as it did in the Provident Life case before the effective date of the new agreement. A new agreement and not an extension agreement was made. The old voting trust certificates were called in and the trustees under the new agreement issued new voting trust certificates and finally the voting trustees themselves did not sign until March 1, 1936. In the Provident Life case the trustees signed prior to December 2, 1969. See the solicitation letter of December 2, 1969 (RII, 9) where Mr. Edick said:

> "The trustees have agreed to extend the term to November 14, 1980 * * *. All of the trustees, directors and officers holding voting trust certificates have consented to renewal."

In the Mannheimer case the claim that the voting trust ran more than ten years was defeated by the finding that the trustees did not sign until March 1, 1936. Here the voting trust agreement clearly ran more than ten years and was therefore contrary to the North Dakota statute that came into effect in 1957.

In Belle Isle Corporation vs. Corcoran, 29 Del. Ch. 554, 49 A.2d 1, a suit was brought to have a voting trust agreement declared invalid. The Delaware Court held that a voting trust agreement which was not extended in the manner provided by the Delaware Corporation Law was invalid and could not be considered to be a new voting trust agreement. The Delaware law specifically provides for extension agreements and teh extension must be sought within one year prior to the time of expiration of the original voting trust agreement. The voting trust agreement involved was to expire on January 22, 1944. On May 27, 1939 an extension agreement was entered into and the Court held the extension was invalid.

Under the North Dakota law adopted in 1957 an extension could not be had and yet that is exactly what was attempted. Only a new agreement could have been made and if there were a new agreement there would be new trustees whereas in this case it is contended the old trustees issued a new security. This is not possible under the effective North Dakota statute.

See also Perry vs. Missouri-Kansas Pipeline Co., 191 A.823, the Chancery Court of Delaware considered a voting trust which by the terms thereof was to run for eleven years. Citing the New York cases, the Court held that the voting trust was void in its entirety and not good for ten years with only the excess period being invalid and the Court quoted from the Morse case as follows:

> "Whatever the rule of common law may have been, when the legislature, the source of corporate power and authority, acts, voting trusts become legal when organized in conformity with the statute and not otherwise."

On the subject of filing a counterpart of the voting trust agreement with the company as required by NDCC 10-19-35 it is the position of the petitioners that this means something other than a copy and must mean either the original or a duplicate original. If a copy had been intended, it would have been easy to so specify.

In State vs. Keystone Life Insurance Company (La.) 93 So. 2d 565, the Court considered a voting trust agreement and the fact that a "duplicate" had not been placed on file as required by the Louisiana statute with the corporation, the stock of which was involved. The Court indicated that a duplicate was in effect the same as a counterpart. The Court pointed out that only a photostat of the agreement was placed of record with the corporation and said:

> "This type of copy does not contain the signatures of the subscribers nor does it afford others the opportunity to sign and our opinion is that it does not have the legal effect and validity of a duplicate and does not satisfy the

> requirements of LSA-R.S. 12:33. The word 'duplicate' ordinarily embodies primarily the idea of exact identity, being the same as an original and having all of the legal effect and validity of an original."

The Louisiana Court quoted further from Vurrill's Dictionary discussing the definition of a duplicate and the quotation was as follows:

> "A 'duplicate' is sometimes defined to be a copy of a thing, but, though generally a copy, a duplicate differs from a mere copy, in having all the validity of an original. Nor, it seems, need it be an exact copy. Defined also to be the counterpart of an instrument; but in indentures there is a distinction between counterparts executed by the several parties, respectively, each party affixing his or her seal to only one counterpart and duplicate originals each executed by all of the parties."

Because of the failure to file the duplicate of the trust agreement with the corporation, the Louisiana Court said that the inevitable conclusion must be that the Keystone Trust had no legal standing.

In Abercrombie vs. Davies, 130 A. 2d 338, the Delaware Court considered an agreement as to voting shares of stock of a corporation that was to run for a term of ten years. Following Perry vs. Missouri-Kansas Pipeline Co., supra, and the New York cases, the Court said:

> "The test of validity is the rule of the statute. When the field was entered by the legislature, it was fully occupied and no place was left for other voting trusts. The statute lays down for voting trusts 'the law of their life', compliance with its provisions is mandatory. Voting trusts not so complying are illegal."

Further, the Delaware Court found that a copy of the voting trust agreement was not on file with the corporation and that the stock was not transferred on the books of the corporation to the trustees. The Court said further:

> "Now, the provisions of the statute that were not complied with are the requirements that the shares be trans-

> ferred on the books and the requirements that a copy of the agreement shall be filed in the corporation's principal office in Delaware. * * * If the validity of a stockholder's pooling agreement of the kind here presented were to be sustained, the way is clear for the creation of secret voting trusts. The statute clearly forbids them."

See also Smith vs. Biggs Boiler Works Co., 91 A.2d 193, 34 ALR 2d 1125 and the annotation on the validity of voting trusts in 98 ALR 2d 376.

In Wolf vs. Roosevelt et al., 290 N.Y. 400, 49 N.E. 2d 502, the Court of Appeals of New York considered a case that involved the reduction of the term for which voting trusts would be valid from ten years to five years as it applied to a voting trust that had been made for a term of ten years. The majority of the Court held that the statute was prospective only and that a voting trust that was valid for ten years could continue for the term but that any new voting trust thereafter made could be made only for a term and on the conditions provided by the new law. Three of the Judges dissented, holding that when the legislature reduced the period for which voting trusts could exist that the same applied to even existing voting trust agreements. The point, of course, if from the standpoint of the petitioners that there was no provision in the new law for extension agreements. When the trustees of the Provident Life Insurance Company voting trust agreement proposed to take action in 1969 they had to reckon with the new law. At this point the law had eliminated extension agreements and no extension agreement was possible. The only thing that could be done was the adoption of the new voting trust agreement and the new voting trust agreement should not have contained provisions for further extension beyond ten years.

The Court of Appeals in citing Pacific R.R. vs. Baldwin, 89 F.2d 269, (Eighth Cir. 1937) (See Appendix B A25 of the petition in case 74-423) missed the point of the argument of the appellants. Our contention is that after the passage of NDCC

NDCC 10-19-35 no extension agreement could thereafter be made. In the Baldwin case the Eighth Circuit Court of Appeals was considering a Delaware corporation. Approximately a year after the voting trust agreement involved was made the Delaware law was amended to limit the maximum term of any voting trust agreement to ten years. It was contended, citing the Morse case, supra, that although there was nothing in the amendatory act which specifically made it applicable to voting trust agreements executed prior to its adoption, it must be so applied. The Court of Appeals said that it should not be given a retrospective operation. We believe the Court of Appeals have overlooked the fact that the Supreme Court of Delaware in Abercrombie vs. Davies, supra, subsequently held otherwise and the decision of the Eighth Circuit Court of Appeals in the Baldwin case was made before the decision of this Court in 1938 in Erie Railroad Company vs. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 ALR 1487, which requires federal courts to follow in matters of general jurisprudence the unwritten law of the state as declared by its highest court. We suggest that the decision would have been different if the case were before the court today.

We also believe that in citing Oppenheimer vs. Cassidy, 345 Ill. App. 212, 102 N.E. 2d 768, to the effect that there can be an extension agreement although the law of Illinois did not provide for extension agreements, the Court of Appeals missed the point. The Court in that case found that there was a new voting trust agreement. Accordingly we do not believe that the case is applicable.

To summarize the contentions of the petitioners, it is urged that the voting trust agreement and the extended certificates attempted to be put into effect were invalid for the following reasons:

(1) The extension agreements were made and signed by all the parties, including the trustees long before the expiration date on the original trust agreement and bound the parties to an

agreement extending more than ten years contrary to the statutes. Certificates were regularly traded, dated more than ten years prior to November 14, 1980, thus covering a period of more than ten years contrary to the statute.

(2) No counterpart, which is something more than a copy, was ever filed with Provident. To have been effective the original consents, since the parties did not sign duplicates or counterparts, should have been filed. The address labels on the consent forms were a part of the forms. If a copy could be filed then an important part of the copy was deliberately left off and what was filed was not a true copy, even assuming a copy would suffice as a counterpart.

(3) No extension agreement could be made since the statute did not provide for extensions under the law that was in effect in 1969.

(4) Even if the extension was otherwise valid, it is illegal and void because of the provisions for further extension beyond ten years.

(5) Since only a new voting trust agreement could be made in 1969, the law was not complied with as to transferring the shares to the trustees for the purpose of the agreement. In order that a valid voting trust agreement could be made in 1969 the trustees of the old trust should have transferred the stock to the individual owner so that they could again transfer the same to the trustees under the new agreement. Clearly this was not done.

II

Whether registration of the proposed extension of the Provident Life Insurance Company voting trust agreement under the provisions of the Securities Act of 1933 was a condition precedent to valid solicitation of consents to the extension.

As pointed out supra, the Commission takes the view that a

new voting trust agreement was involved. If it was a new voting trust agreement then the issuers were a new entity and obviously registration was required. A new trust was being created and therefore the old trust and the new trust and the old trustees and the new trustees were separate legal entities. Accordingly the offer and sale of interests in the new voting trust without registration violated Section 5 of the Securities Act of 1933, 15 U.S.C. Section 77e.

In connection with this subject it is pointed out that there were originally 188 persons that signed the 1955 agreement. In 1969 when the solicitation was begun on the new voting trust or so-called extension there were 1,808 certificate holders of whom 1,343 executed the consent forms. The new certificate holders had not signed the old voting trust agreement and were not even furnished with a copy thereof in connection with the solicitation.

We urge that Corporation Trust Co. vs. Logan, 52 F.Supp. 1002, clearly points out the need for registration of voting trust certificates where the number of persons solicited is substantial. Further we urge that the view of the Commission that a new trust agreement was involved should be followed and that since a new agreement was involved the trustees were a new legal entity and registration under the Securities Act of 1933 was required and there was no Section 3 (a) (9) exemption available.

III

Whether the failure to register the original voting trust certificates in 1955 under the provision of NDCC 10-04-02, the North Dakota statute requiring registration of securities and similar statutes in other States invalidated the subsequent solicitation of consents to the extension of the voting trust certificates.

All of the major items necessary to the creation of a voting trust occurred in North Dakota. All but two of the trustees of the voting trust were North Dakota residents, (see RII page 12). The stock was deposited in North Dakota and a great many of the parties signing consents, including all but two of the trustees, signed in North Dakota.

It is also clear that the original voting trust agreement was never registered in North Dakota and it is conceded that the voting trust agreement and the voting trust certificates were never registered in any other State in which solicitation was made and we believe it is conceded that if a new voting trust agreement was involved that registration was required everywhere.

Under the North Dakota law, NDCC 10-04-02 (App. A1) dealing with definitions subsection 12 provides:

> " 'Security' shall mean * * * voting trust certificate."

NDCC 10-04-04 (App. A1) provides:

> "It shall be unlawful to sell or offer for sale, any securities in this State except those exempt under Section 10-04-05 or those sold in transactions exempt under Section 10-04-06 (neither of these sections are applicable) * * *."

The only possible provision listed in NDCC 10-04-06 dealing with exempt transactions that would have any application to an exchange of securities was subsection 7 thereof.

This section, including the beginning of the section, reads as follows:

> "Except as hereinafter in this section expressly provided, Sections 10-04-04 * * * shall not apply to any of the following transactions: (7) The issuance and delivery of any securities in exchange for any other securities of the same issuer pursuant to a right of conversion entitling the holder of the securities surrendered in exchange to make such conversion."

Mr. Sugrue of counsel for the trustees obviously had doubts as to whether there was an exemption available similar to Section 3 (a) (9) of the Securities Act of 1933. See his letter to John A. Zuger dated September 11, 1969, RII 89-91, where he stated:

> "We are, of course, particularly concerned with the requirements of South Dakota, the laws of which do not appear to provide any exemption for the proposed solicitation, and of North Dakota, the laws of which provide an exemption for the issuance of securities pursuant to a 'right of conversion'. Because the proposed solicitation does not technically involve any right of conversion, we believe that the matter should be taken up informally with the North Dakota Securities Commissioner to determine whether he would be inclined to take the position that a right of conversion is involved or that, in any event, if the solicitation is undertaken in North Dakota without qualification under its Blue Sky Law, he would not be inclined to take any action with respect thereto.
>
> We also believe that a similar discussion should be had with the South Dakota Commissioner for the purpose of determining whether any administrative relief in the qualification requirements of the laws of that State are available."

We then have the situation that the original solicitation of signatures to the voting trust agreement was made of more than 188 persons without any registration in North Dakota or any other State. Further whether a new Agreement was involved or an extension of the old agreement, there was no Section 3(a)(9) exemption available in North Dakota, the home State, nor in South Dakota, the adjoining State. Obviously, the original solicitation in 1955 was illegal and certainly the solicitation made subsequently in 1969 and 1970 was contrary to state law since there had never been any original registration and there could be no basis for a so-called Section 3 (a) (9) exemption where the original solicitation was itself illegal and there was no subsequent registration.

Further, if a new agreement was involved, the solicitation everywhere was concededly contrary to the laws of the various States.

NDCC 10-04-17 provides in part as follows:

> "Every sale or contract for sale made in violation of any of the provisions of this chapter * * * shall be voidable at the election of the purchaser * * *. (3) Nothing in this chapter shall limit any statutory or common law right of any person in any Court for any act involved in the sale of securities."

We think this means that in addition to recovering the purchase price any person interested may bring actions for declaratory judgment or employ other equitable or statutory remedies to determine rights under or in securities. Since the securities were issued illegally under North Dakota law the plaintiffs as purchasers or persons who have acquired such securities from purchasers are entitled to maintain actions for declaratory judgment establishing the invalidity of the securities issued.

North Dakota by virtue of this statute is in the class of States that treats transactions effected in violation of the Blue Sky Law as being void at the option of the purchaser. See Hummel vs. Kranz, 126 N.W. 2d 786.

In 87 ALR 98 is a long annotation on the subject of State Blue Sky Laws with the cases set out which hold in some States that the sales are void and others that the sales are voidable.

IV

Whether the Distirct Court should have allowed the plaintiffs to offer proof that all expenses in connection with the extension of the voting trust, including the expenses of solicitation of the consents, was paid for by Provident Life Insurance Company and if so, did such payments constitute remuneration, direct or

indirect, for solicitation of an exchange, actually being solicited by the voting trustees, within the meaning of Section 3 (a) (9) of the Securities Act of 1933 and related State laws.

Even if it is determined that the solicitation of the consents to the so-called extension agreement constituted the exchange between an existing issuer and its security holders, there is still the question as to whether the Section 3 (a) (9) exemption is available if there was remuneration paid, direct or indirect. The petitioners take the position that the contribution by Provident Life Insurance Company of all the expenses of arranging for the extension agreement and the payment of all the expenses of solicitation for and on behalf of the trustees of the voting trust constituted remuneration directly or indirectly for soliciting the exchange.

In Section 3.10 (4) in Business Organizations, Sowards, The Federal Securities Act, the text writer says:

> "The language of Section 3 (a) (9) expressly limits the availability of the exemption to situations 'where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange'. Accordingly the payment of commission or other remuneration for soliciting the exchange of any part of the issue will result in the loss of the exemption * * *. The meaning of 'commission or other remuneration' has been accorded realistic treatment. It is obvious that 'commission or other remuneration' must mean something different from such a term as 'expenses'. Otherwise, no such exchange could be effected, for engraving fees, clerical expenses and the like are necessary in order to effect almost any such exchange. The dividing line would thus distinguish between payments which are in essence for promotional activity as distinguished from payments which cover the expenses incident to such an exchange.
>
> These expenses would, of course, include such matters as engraving costs, clerical costs but in addition could include a payment to third persons for services in connection with effecting but not promoting such an exchange. * * *

> Finally, inasmuch as the section's language includes payments made 'directly or indirectly', the fact that such payments are made by an officer of the issuer or some other person will not cure the unavailability of the exemption."

Our contention is that since Provident paid all these expenses not only the incidental expenses but the expenses of promotion of the exchange, constituted a remuneration, direct or indirect to or for the benefit of the trustees who were personally benefited and therefore because of such remuneration, direct or indirect, for expenses that should have been borne by the trustees, the exemption is not available.

The above is an important point affecting securities laws and if this Court should determine to grant certiorari in case 74-423 then certiorari should be granted on this petition so that this question can be considered.

See also Loss on Securities, Chapter 3B page 580 where the text writer said:

> "The exemption will still be destroyed, however, when any remuneration is paid 'directly or indirectly' for soliciting exchanges. This presumably covers remuneration received by the solicitors from sources other than the issuer."

The above is directly applicable to this situation since the solicitors (the trustees) received remuneration from sources other than themselves. The offer of proof should have been allowed and the petitioners permitted to develop the subject by cross-examination of Mr. Edick, President of Provident.

V

Whether, since the trustees of the voting trust failed to register the Provident Life voting trust agreement under the provisions of the Securities Exchange Act of 1934 as amended and no compliance was made with the proxy regulations under

the Act, the Court should have held that since proper solicitation was not made before the expiration of the voting trust agreement on November 15, 1970, all consents to the extension of the voting trust agreement were void, instead of permitting resolicitation, if the voting trustees are so advised, under the direction of the District Court.

The point intended to be made under this heading is that since the original voting trust agreement expired by its own terms on November 15, 1970, that if the solicitation was improper and in violation of the proxy regulations of the Securities and Exchange Act of 1934, it is now too late when the voting trust agreement expired by its own terms, to now order and direct that the respondents may, if so advised, under the direction of the Court, resolicit consents to extension of the voting trust agreement. We urge that the ruling should have been that because the proxy provisions were violated that the consents were invalid and that it is now too late to permit a resolicitation.

VI

Whether the petitioners as stockholders of Provident Life Insurance Company and voting trust certificate holders have standing to maintain this declaratory judgment action under the provisions of the Securities Act of 1933 and corresponding securities laws of the various States.

At the time of the amendment of the complaint in September, 1972, before the commencement of the trial, Reserve Life Insurance Company had voting trust certificates purporting to expire November 14, 1980 in the amount of 16,123.769 shares and Midland National held 717.15 voting trust certificates purporting to expire November 14, 1980. (RI pages 50 and 51) Therefore, it is the position of the petitioners that they qualified as purchasers of securities having succeeded to said securities by purchase.

In Corporation Trust Co. vs. Logan, supra, the action was one to rescind the exchange of stock for voting trust certificates for failure to comply with the Securities Act of 1933. We urge that the Logan case is good law and its application to this situation should be declared by this Court. This issue was not resolved by the Court of Appeals in this case because it disposed of the matter on the ground that there was a Section 3 (a) (9) exemption available. Since it appears that the Section 3 (a) (9) exemption is not available, the issue of standing under the Securities Act of 1933 should be resolved.

CONCLUSION

As previously stated in this petition the petitioner herein has opposed the granting of a writ of certiorari in case number 74-423 and if certiorari is denied in that case then the petitioner has no objection to this petition likewise being denied but if the petition is granted in 74-423 then for the reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

North Dakota Statutes – North Dakota Century Code.

Section 10-04-02:

> "When used in this chapter, unless the context or subject matter otherwise required: * * *
>
> 4. 'Issuer' shall mean every person who issued or proposes to issue any security, except that,
>
> a. With respect to certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in an unincorporated investment trust, whether or not of the fixed, restricted management, or unit type, issuer means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; * * *
>
> 12. 'Security' shall mean any note, stock, treasury stock, bond, debenture, evidence of indebtedness, dertificate of interest or participation, certificate of interest in oil, gas, or other mineral rights, collateral trust certificates, preorganization certificate or subscription, transferable share, investment contract, voting trust certificate, or beneficial interest in title to property, profits or earnings, or any other instrument commonly known as a security, including any guarantee of, temporary or interim certificate of interest or participation in, or warrant or right to subscribe to, convert into or purchase, any of the foregoing."

Section 10-04-04:

> "It shall be unlawful to sell or offer for sale, any securities in this state, except those exempt under section 10-04-05 or those sold in transactions exempt under section 10-04-06, or those registered by description under section 10-04-07 or by announcement under section 10-04-07.1, unless such securities shall have been registered by qualifications as hereinafter provided in section 10-04-08."

Section 10-4-17:

> "Every sale or contract for sale made in violation of any of the provisions of this chapter * * * shall be voidable at the election of the purchaser * * * provided * * * (3) nothing in this chapter shall limit any statutory or common law right of any person in any Court for any act involved in the sale of securities."

Section 10-19-35:

> Any number of shareholders of a corporation may create a voting trust for the purpose of conferring upon a trustee or trustees the right to vote or otherwise represent their shares, for a period of not to exceed ten years, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, by depositing a counterpart of the agreement with the corporation at its registered office, and by transferring their shares to such trustee or trustees for the purpose of the agreement. The counterpart of the voting trust agreement so deposited with the corporation shall be subject to the same right of examination by a shareholder of the corporation, in person or by agent or attorney, as are the books and records of the corporation, and shall be subject to examination by any holder of a beneficial interest in the voting trust, either in person or by agent or attorney, at any reasonable time for any proper purpose."

Securities Act of 1933 and U.S.C. citations:

Section 15, 15 U.S.C. Section 77 (e):

> (1) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly –
>
> > (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
> >
> > (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or

instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person directly or indirectly –

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this subchapter, unless such prospectus meets the requirements of section 77j of this title; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 77j of this title.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order to stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 77h of this title.

Section 12, 15 U.S.C. Section 77 (1):

Any person who –

(1) offers or sells a security in violation of section 773 of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails,

by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 16, 15 U.S.C. Section 77 (p):

"The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity."

Securities and Exchange Act citations:

Section 29, 15 U.S.C. Section 78cc:

"(a) Any condition, stipulation or provision binding any person to waive compliance of any provision of this chapter or of any rule or regulation thereunder or of any rule of an exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract * * * heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder shall be void (1) regard the rights of any person who, in violation of any such provision, rule or regulation shall have made or engaged in the performance of any such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation. * * *"

SUPREME COURT, U. S.

FILED

DEC 20 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-617

RESERVE LIFE INSURANCE COMPANY AND MIDLAND NATIONAL LIFE INSURANCE COMPANY,

Petitioners,

vs.

PROVIDENT LIFE INSURANCE COMPANY, R. W. EDICK, ET AL., AS TRUSTEES OF THE PROVIDENT LIFE INSURANCE COMPANY VOTING TRUST DATED NOVEMBER 15, 1955, AND EXTENDED TO NOVEMBER 14, 1980,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

MAY IT PLEASE THE COURT:

Respondents respectfully file this Brief in Opposition to the Petition for a Writ of Certiorari.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals decided a question of State law in conflict with applicable State law (Rule 19).

II.

Whether Petitioners have standing to sue under the Securities Act of 1933.

III.

Whether the extended Voting Trust Certificates were exempt from the registration provisions of the Securities Act of 1933 under Section 3(a)(9) thereof.

ARGUMENT

I.

The Court of Appeals Did Not Decide an Important State Question in a Way in Conflict with the Applicable State Law.

The state law questions here involved are two:

(1) The validity of the voting trust agreement and its extension under the North Dakota voting trust statute, and

(2) The validity of the voting trust and the extension thereof under various state Blue Sky Laws.

1. The Validity of the Voting Trust Agreement and Its Extension Under the North Dakota Voting Trust Statute

Petitioners urge that the extension of the voting trust agreement was invalid under the North Dakota statute regulating voting trust agreements (Pet. pp. 14-15) for five "reasons", summarized in their Petition (pp. 22, 23). They argue this as though the question presented was whether the Court of Appeals decided the state law correctly, when the issue pursuant to Rule 19 is whether that Court decided it contrary to applicable state law. There is no North Dakota law contrary to the

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A refers to Appendices to Respondents' Petition for Certiorari filed in this Court, No. 74-423.

Pet. refers to the Petition of Petitioner.

holding of the District Court, as affirmed by the Court of Appeals.

The Court of Appeals boiled down Petitioners' five "reasons" (Pet. 22, 23) to "two contentions":

> "(a) that the extension of the voting trust violated the ten-year statutory limitation and (b) that because the trustees removed mailing labels from the consents to the extension of the trust agreements, the trustees thereby failed to file a requisite 'counterpart of the voting trust agreement' ".

Of these it said:

> "The District Court rejected both of these contentions and held the extension of the voting trust valid and the filings in compliance with N. D. Cent. Co. § 10-19-35. We find no North Dakota case law pertinent to the issues raised, and appellants have presented no persuasive authority contrary to the determination of the trial court." (A25)

Most of the foreign cases cited by Petitioners (Pet. pp. 16-22) with respect to the validity of the extension of the voting trust were argued to the Court of Appeals and found not "persuasive." On the issue of filing "a requisite counterpart" of the said agreement, the Court of Appeals deferred to the expertise of the District Judge (The Honorable Ronald N. Davies) in interpreting North Dakota law, and followed his interpretation. (A26). While Petitioners are critical of this interpretation (Pet. p. 15), they cite no North Dakota law to the contrary.

The only North Dakota case they cite is *In re White*, 69 N. D. 61, 284 N. W. 357 (1939). No question of statutory retroactive application was involved there, as here. Section 16 of the Constitution of North Dakota provides:

> "No bill of attainder, ex post facto law or law impairing the obligations of contracts shall ever be passed."

Section 1-02-10 of the NDCC provides:

> "No part of this Code is retroactive unless it is expressly declared to be so."

The North Dakota statute with respect to voting trusts is not by its terms retroactive. The North Dakota courts have stated that, even as to statutes to which the legislature may constitutionally give retroactive effect, there is no presumption that such effect was intended.[1]

2. The Validity of the Voting Trust and the Extension Thereof Under Various State Blue Sky Laws

The Court of Appeals discussed this question under IV, entitled, "Standing and Exemption under State Laws." (A30, 31). We see no reason to expand the discussion. Petitioners have cited no North Dakota or other state law in conflict with the Court of Appeals' determination.[2]

II.

Petitioners Have No Standing to Sue Under the Securities Act of 1933

Petitioners' suit challenged the validity of the extension of the terms of the voting trust because the voting trust certificates issued in connection with the extension were not registered under Section 5 of the Securities Act of 1933. (15 USC § 77e, Pet. 23, 24) Petitioners assert that they have standing to maintain this action because at the time they amended their complaint they held extended voting trust certificates and therefore "qualified as purchasers of securities having succeeded to said securities by purchase." (Pet. 30) The Court of Appeals recognized that petitioners faced a serious question of standing but

1. *Marks* v. *City of Mandan*, 296 N. W. 34 (N. D. 1941); *First National Bank* v. *Bovey Shute & Johnson, Inc.*, 191 N. W. 765 (N. D. 1922).

2. The Court of Appeals ignored Petitioners' III (Pet. 24-27) for the obvious reason that the record showed and the District Court found "that the Plaintiffs had failed to prove that the original offering of Voting Trust Certificates in 1955 and 1956 violated the provisions of the Securities or Blue Sky laws of any state." (A16), —entirely apart from the fatal bar of the statute of limitations.

assumed standing to get to the merits of respondents' Section 3(a)(9) claim for exemption [15 USC § 77 c(a)(9)], noting that it had previously held in *Greater Iowa Corp.* v. *McLendon*, 378 F. 2d 383, that the term "purchasers" as used in Section 12 of the Act (15 USC 77*l*), which created a right in private litigants, "was limited only to those purchasers of such voting trust certificates who were in privity with the issuer." (A27)

Section 12 of the 1933 Act provides that:

> "Any person who—
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> (1) offers or sells a security in violation of Section 5 of this title . . . shall be liable *to the person purchasing such security from him*, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security." (Italics ours.)

This language clearly requires that there be privity between the seller and the buyer.

In *Greater Iowa* the plaintiffs alleged that defendants violated Section 5 of the 1933 Act by failing to register the voting trust certificates which they were offering in exchange for common stock of Greater Iowa Corporation. Defendants claimed that the plaintiffs had no standing under Section 12 to allege violations of Section 5. The Court stated (378 F. 2d at 789):

> "None of the plaintiffs has purchased any of the Iowa Trust certificates *from the defendants*. Since 15 U. S. C. § 77*l* only provides relief to 'purchasers' it is clear that this section cannot provide plaintiffs with a basis upon which to seek recovery". (Italics ours.)

The Court further stated (*id.* at 790):

> "The intent of Congress is clear. Section 12 provides a private civil remedy to 'purchasers.' We think this is the civil remedy given to private parties by the framers of the Act, and excludes establishment of additional private civil remedies. Had Congress desired to extend the private

> civil remedy it could have done so by the addition of only a few words. Its failure to do so, and its express limitation to 'purchasers' is a positive indication that Congress desired these provisions privately enforced by purchasers only. It is our conclusion that private civil liability for violations of § 5(a) and § 17(a) exist only when the provisions of § 12 (15 U. S. C. § 77*l*) are met. Therefore, plaintiffs have no jurisdictional standing to invoke the provisions of § 5(a) and § 17(a) of the 1933 Act."

Greater Iowa was followed in *Simmons* v. *Wolfson*, 428 F. 2d 455, 456 (C. A. 6, 1970) and *Duffy* v. *Ranger Securities Corp.*, 346 F. Supp. 1401, 1405 (E. D. N. Y. 1972). While there may be certain exceptions where controlling persons, agents and aiders and abettors are involved, it is clear that Section 12 contemplates an action only by a buyer against his immediate sellers. Loss, *Securities Regulation* (1961), p. 3840. Nothing in this record suggests that respondents participated in the subsequent sale of the certificates to petitioners.

Petitioners' argument on standing is found in two places. In the Argument proper (Pet. 30, 31), they rely solely on *Corporation Trust Co.* v. *Logan*, 52 F. Supp. 999 (D. Del., 1943). In their Reasons for Granting the Writ (Pet. 14), in addition to *Logan* they quote from *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282 (1940), and suggest that the Court of Appeals here "recognized the existence of an important problem as to the rights of private litigants under the 1933 Act and pointed out differences in decisions in *Corporation Trust Co.* v. *Logan*, *supra*, including *Kinsey* v. *Knapp*, 154 F. Supp. 263 . . ." This reference is to footnote 7 of the Court of Appeals opinion. (A27)

In *Logan*, the plaintiffs were purchasers from the issuer and clearly had standing to sue under Section 12. In *Knapp* v. *Kinsey* 249 F. 2d 797 (1957) the Sixth Circuit reversed the judgment of the District Court in *Kinsey* v. *Knapp* that a voting trust was voidable because of failure to register the certificates under the Securities Act of 1933. It stated at page 803 that the

District Court had not answered the question "Is the relief granted by the District Judge available to a purchaser of the security from the original owner . . ." Observing that defendants contended the cause of action given to a certificate holder by Section 12(1) was not assignable to a subsequent purchaser, the Court stated at page 804 that "The section of the Act referred to is subject to the construction that the cause of action is limited to the original owner, with a right to rescission if he still owns the security and a claim for damages if he is no longer the owner. This provision of the Act has not been construed by the District Judge." This issue having been sent back to the District Court for further proceedings, there is no conflict between this decision and that of the Eighth Circuit in *Greater Iowa.*

In *Deckert,* the issue of standing to sue under Section 12 of the Securities Act of 1933 because of lack of privity was not involved. There was privity between buyer and seller and the Court stated that "Undoubtedly any suit to establish the civil liability imposed by the Act must ultimately seek recovery of the consideration paid less income received or damages if the claimant no longer owns the security." (311 U. S. at 288) All *Deckert* holds is that the action may be one in equity as well as in law and that the claimant was entitled to seek injunctive relief or the appointment of a receiver to protect assets of the defendant pending the granting of relief under Section 12.

Labeling their suit as a "declaratory judgment action" (Pet. 4, 13, 27, 30) is no aid to petitioners. "The Declaratory Judgment Act created no new rights, but rather created a new remedy with which to adjudicate existing rights" (*Walker Process Equipment, Inc.* v. *FMC Corporation,* 356 F. 2d 449, 451 (C. A. 7, 1966)). The sole right created here is that prescribed by Section 12, namely, the right of a purchaser to sue, and not the right of a purchaser from a purchaser to sue, as petitioners contend. (Pet. 30)

III.

The Extended Voting Trust Certificates Were Exempt from the Registration Provisions of the Securities Act of 1933 Under Section 3(a)(9) Thereof.

The Court of Appeals, with one exception, noted hereafter, discussed this subject fully in III of its Opinion (A26-30). It quoted Section 3(a)(9) (A26) and it referred to the position of the SEC and Petitioners (A27, 28), which is the identical argument petitioners advance here. (Pet. 10, 11; 23, 24.) It rejected that argument, stating controlling reasons for such rejection (A28-30). We perceive no necessity to reargue the question here as we did in the Court of Appeals, but are content to stand upon the Circuit Court's opinion. Petitioners cite no authority to the contrary. All they suggest is that the SEC disagrees with the Eighth Circuit, scarcely a ground for certiorari.

The exception noted is petitioners' protest that they should have been permitted to introduce evidence with respect to which they made an offer of proof. (Pet. 9, 10.) This is a claim that respondents had no Section 3(a)(9) exemption because Provident Life paid all of the expenses in connection with the extension of the voting trust, including attorneys' fees. The Court of Appeals duly noted that the trial court found that "no commission or other remuneration has been paid or given, directly or indirectly, for soliciting such exchange" (A29, 30), a condition of the Section 3(a)(9) exemption. Again, petitioners cite no authority supporting the relevance of the evidence they offered to prove.

Obviously, the trustees did not receive a "commission" or "remuneration", nor did they pay one. The argument, if cognizable in this frame of reference, is devoid of merit. See CCH Fed. Sec. L. Rep., ¶ 2165.25 (a letter from the Chief of the Securities Division of the Federal Trade Commission, originally in charge of enforcing the 1933 Act), Loss, *Securities Regulation* (1961

ed.) (p. 580) and Sowards, *The Federal Securities Act*, 11 Business Organizations § 3.10(4) at 3-26 n. 67, all of which state that payments of attorneys' fees, printing costs, postage and telephone bills and other similar expenses, are clearly payments which cover the expenses incidental to the exchange and do not destroy the Section 3(a)(9) exemption.

CONCLUSION

It is submitted that the petition does not come within any of the considerations enunciated in Rule 19 and that, therefore, the petition should be denied.

Respectfully submitted,

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